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IN THE

# Supreme Court of the United States

In re: STONE & WEBSTER, INC.

SAUDI AMERICAN BANK,

*Petitioner,*

*v.*

SAUDI ARABIAN OIL CO.,
STONE & WEBSTER, INC.,
STONE & WEBSTER ENGINEERING CORP.,
and SWE&C LIQUIDATING TRUSTEE,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## REPLY BRIEF

DANIEL E. ROSENFELD
BRUCE S. BARNETT
DLA PIPER LLP (US)
33 Arch Street, 26th Floor
Boston, MA 02110-1447
(617) 406-6000

DEBORAH MESHULAM
*Counsel of Record*
DLA PIPER LLP (US)
500 Eighth Street, NW
Washington, DC 20004
(202) 799-4000

*Attorneys for Petitioner*

227379

CP

COUNSEL PRESS
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## CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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## ARGUMENT IN REPLY

### I. Respondent's Opposition Is Based Upon A Distinction Between Creditors And Committees That Does Not Exist In The Statute.

Respondent acknowledges that the Courts of Appeals are split on whether Bankruptcy Code § 1109(b) grants an absolute right to intervene in adversary proceedings. Respondent grounds its Brief in Opposition to SAMBA's Petition for Certiorari on the erroneous contention that the circuit split is not significant for this case because SAMBA is an individual creditor and party in interest whereas the cases evidencing the split involved committees of creditors. The distinction upon which Respondent's opposition rests does not exist in the statute:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b). On the plain language of § 1109(b), there is no basis for treating a creditor differently from a creditors' committee — both are defined as parties in interest.

In buttressing the phantom distinction, Respondent's argument mischaracterizes the relevant Courts of Appeals decisions by stating that the cases "limit their holdings to the narrow context of intervention by official committees,

appointed by the United States Trustee." Brief in Opposition at 8. Quite the opposite is true. While the cases each involved a committee, each of the Courts of Appeals acknowledged that the question implicated — and that its holding would apply just the same to — individual creditors. For example, the Third Circuit and the parties before it in *Marin Motor Oil* recognized that the absolute right it was recognizing encompassed individual creditors as well as representative committees:

> Appellants are unable to provide any support for their speculation that multitudes of individual creditors and stockholders would intervene in adversary proceedings unless we reject the broad and absolute reading of section 1109(b). Surely relatively few individuals would have enough interest in the outcome of an adversary proceeding to seek to intervene.

*Official Unsecured Creditors' Comm. v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445, 453 (3d. Cir. 1982). The Second Circuit framed its *Caldor Corp.* opinion just as broadly:

> [Appellant] argues that [§ 1109(b)] creates an unconditional statutory right for *parties in interest* to intervene in adversary proceedings that occur in connection with a Chapter 11 bankruptcy case. Because we find that the plain text of the statute indicates Congress

> intended to grant such a right, we reverse the lower courts' decisions and remand . . . .

*Term Loan Holder Comm. v. Ozer Group, L.L.C. (In re Caldor Corp.)*, 303 F.3d 161, 162-63 (2d Cir. 2002) (emphasis added). *See also Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1232 (3d Cir. 1994) ("We rejected the trustee's argument, stating that § 1109(b) gave *parties in interest* an 'unqualified' right to be heard ....") (emphasis added) (citing to and characterizing the holding in *Marin Motor Oil*). The Fifth Circuit, while coming out the other way on whether § 1109(b) applied to adversary proceedings, also made no distinctions among parties in interest. *Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283, 1285, 1287 (5th Cir. 1985) (stating the question as "whether § 1109(b) provides parties in interest with an absolute right to intervene in bankruptcy adversary proceedings" and declining to follow *Marin Motor Oil* in part because it concluded that, under that case, "both the committee and each individual creditor — perhaps hundreds of them — would be automatic parties to every adversary proceeding connected with the case"[1]).

The legislative history supports the unanimous view that, however interpreted, § 1109(b) applies equally to all parties in interest. The relevant Senate Report stated that the provision which became § 1109(b) "[p]rovides, in unqualified terms, that any creditor, equity security holder, or an indenture trustee shall have the right to

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1. Of course, a party in interest would only become a party to the proceeding if it sought to intervene.

be heard as a party in interest under the chapter in person, by an attorney, or by a committee." S. Rep. No. 95-989, at 116, *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5902.

A leading treatise explains why application of § 1109(b) at both an individual and a collective level furthers the fundamental purposes of Chapter 11 — that is, to provide a forum for the negotiated resolution of a case in a manner that is as inclusive and accommodating as possible. "[E]ven though the [Bankruptcy] Code provides for and recognizes the use of representative bodies and structures (*e.g.*, 'committees' and 'classes'), it also necessarily promotes the right of each individual to voice his or her views regarding the course of the case as well as the resolution of significant disputes that may affect either its outcome or the ultimate treatment of the individual's stake." 7 *Collier on Bankruptcy* ¶ 1109.02[3][a] (15th ed. Rev. 2008).

## II. SAMBA'S Complaint In Intervention Stated A Good Claim For Relief And Did Not Rely Upon Conclusory Allegations.

Respondent seeks to distract the Court from the merits of the Petition by referring to the Bankruptcy Court's premature speculation about the validity of SAMBA's Assignment of Contract Proceeds.[2] Respondent highlights those concerns in its Brief in Opposition, but neither it nor any other party questioned the validity of the Assignment when opposing the motion

2. Capitalized terms not defined herein have the meaning given to them in the Petition for Certiorari.

to intervene in the Bankruptcy Court. They were right not do so because the record shows that SAMBA's Complaint in Intervention stated an adequately pleaded claim against Saudi Aramco that was not based on conclusory allegations. Accordingly, the Bankruptcy Court's hesitation about the ultimate merits of SAMBA's case was not a proper basis for denying intervention and should not give this Court pause in its consideration of the Petition.[3]

SAMBA attached to its Complaint in Intervention the documents establishing its interest in the Contract Proceeds:

- The "Assignment of Contract Proceeds" provided that BS&W "hereby assigns to [SAMBA] all proceeds of the Contract (Proceeds), which shall include proceeds of claims arising out of the Contract." APP0116.[4]

- BS&W sent Aramco the Specific Payment Instruction Letter, instructing Aramco to "pay Saudi American Bank . . . for credit to our account any and all compensation due from you under the [Ras Tanura Contract]." APP0119.

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3. It bears noting that the Third Circuit rested no part of its decision on a concern about the validity of the Assignment.

4. "APP___" cites are to the Appendix submitted to the Court of Appeals.

- Saudi Aramco's subsequent "Acknowledgement of Assignment" stated "[w]e hereby acknowledge receipt of [BS&W's] payment assignment letter." APP0121.

SAMBA recognizes that "naked assertion[s] devoid of further factual enhancement" are insufficient at the pleading stage. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation omitted) (alteration in original). However, its claim to an interest in the Contract Proceeds is factually developed and fully clothed.

Those specifically alleged facts support SAMBA's claim to a protectable legal interest in the Contract Proceeds. "To make an effective assignment of a contract right, the owner of that right must manifest an intention to make a present transfer of the right without further action by the owner or by the obligor." 3 E. Allan Farnsworth, *Farnsworth on Contracts* § 11.3 (3d ed. 2004). "If the right is assignable, no action by either the assignee or obligor is required for an effective assignment." *Id.* § 11.3a. It is beyond cavil that the right to receive a payment of money is assignable, and there is no legitimate basis for questioning the facial validity of the Assignment. Indeed, the Bankruptcy Court did not cite any law in support of its questions about the validity of the Assignment, and the Respondent has not identified any such law to support its subsequent parroting of the Bankruptcy Court's concerns.

In light of SAMBA's specific factual allegations and the documents it attached to the Complaint in Intervention, the Bankruptcy Court's denial of the motion to intervene based on a question about the ultimate validity of SAMBA's claim to the Contract Proceeds was improper. An application for intervention cannot be resolved "by reference to the ultimate merits of the claim the intervenor seeks to assert unless the allegations are frivolous on their face." *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999). Given that "the court's ruling determines whether the claim or defense can be litigated and justice sought," the court "must be liberal in determining whether a valid cause of action or defense has been pleaded, at least as liberal as it is on" motions to dismiss. 35A *C.J.S. Federal Civil Procedure* § 196 (2007).

Similarly, the Court should not be dissuaded from granting the petition by Respondent's reference to the possibility that it might in the future attempt to amend the Debtors' complaint. By its own admission, Respondent has been raising the possibility of amending the Debtors' complaint for at least six years now. It has never done so. Whether Respondent will someday seek leave to amend (to settle around SAMBA and evade its right to intervene or for some other purpose), the Court should decide whether to grant the Petition based on the Debtors' complaint — the pleading that has been on file in this case since 2002.

## III. The Question Of The Proper Scope Of § 1109(b) Is Important To The Administration Of Reorganization Cases Under Chapter 11 And To Related Adversary Proceedings.

Section 1109(b) is not an obscure provision of federal law. It applies with respect to all Chapter 11 reorganization cases. While not every circuit has taken a position on the issue of whether it grants parties in interest an unconditional right to intervene in adversary proceedings, the split is genuine among the three that have done so. Moreover, as a result of the lower court opinions in this case, there is now divergent interpretation in two of the most significant bankruptcy venues in the country, the District of Delaware (out of which this case arose) and the Southern and Eastern Districts of New York. The Bankruptcy and District Courts of Delaware have adopted (and presumably will continue to apply) the narrow view of § 1109(b) shared by the Fifth Circuit while federal courts in New York are governed by the contrary holding of *Caldor Corp.* Finally, while the Third Circuit panel in this case did not designate its opinion as "precedential," it may still be cited under Federal Rule of Appellate Procedure 32.1, which provides that a court may not prohibit or restrict the citation of federal judicial opinions issued after January 1, 2007, even if they have been designated as "not precedent" or "non-precedential."

## CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

DEBORAH MESHULAM
*Counsel of Record*
DLA PIPER LLP (US)
500 Eighth Street, NW
Washington, DC 20004
(202) 799-4000

DANIEL E. ROSENFELD
BRUCE S. BARNETT
DLA PIPER LLP (US)
33 Arch Street, 26th Floor
Boston, MA 02110-1447
(617) 406-6000

*Attorneys for Petitioner*